



# Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108  
phone: 617-727-0060, fax: 617-723-5851



**SUFFOLK, ss.**

**COMMISSION ADJUDICATORY  
DOCKET NO. 601**

**IN THE MATTER  
OF  
ROBERT S. MCKINNON**

## **DISPOSITION AGREEMENT**

The State Ethics Commission ("Commission") and Robert S. McKinnon ("McKinnon") enter into this Disposition Agreement ("Agreement") pursuant to Section 5 of the Commission's Enforcement Procedures. This Agreement constitutes a consented-to final order enforceable in the Superior Court, pursuant to G.L. c. 268B, §4(j).

On November 18, 1998, the Commission initiated, pursuant to G.L. c. 268B, §4(j), a preliminary inquiry into possible violations of the conflict of interest law, G.L. c. 268A, by McKinnon. The Commission has concluded the inquiry and, on February 23, 2000, found reasonable cause to believe that McKinnon violated G.L. c. 268A.

The Commission and McKinnon now agree to the following findings of fact and conclusions of law:

1. McKinnon is a member of the Board of State Examiners of Plumbers and Gasfitters ("the Board").<sup>1/</sup> Among its other functions, the nine member Board reviews and approves plumbing products for use in the Commonwealth, promulgates the state Plumbing and Gasfitting Code ("the Code") and grants variances to the Code. McKinnon's Board position is unpaid.<sup>2/</sup>

2. Since 1992, McKinnon has worked privately for the Stop & Shop Supermarket Company ("Stop & Shop"). In his private work for Stop & Shop, McKinnon inspects the plumbing in the floors of new Stop & Shop stores under construction in Massachusetts prior to the concrete being poured.<sup>3/</sup> Stop & Shop pays McKinnon \$40 per hour for this work. During the period here relevant, McKinnon earned between \$500 to \$1,000 per month working privately for Stop & Shop.<sup>4/</sup>

3. In 1994, Stop & Shop was building a Stop & Shop superstore in Pittsfield.<sup>5/</sup> A dispute arose between Stop & Shop and the Pittsfield plumbing inspector as to whether two toilet rooms were required on the store's 1,400 square foot mezzanine level. The Pittsfield inspector contended that the mezzanine level was a separate floor requiring its own toilet facilities under the Code.

4. At a Board meeting on August 3, 1994, while he was an unpaid appointed advisor to the Board, McKinnon requested clarification by the Board of the term "mezzanine" as used in the Code. McKinnon argued at the meeting that, for Code purposes, the mezzanine at Stop & Shop's Pittsfield store was not a separate floor requiring its own facilities but rather part of the floor below it.<sup>6/</sup> The Board then voted that it did not agree with the Pittsfield inspector's view. As a result, Stop & Shop was not required to install the two toilet rooms on the mezzanine level of the Pittsfield store.<sup>7/</sup>

5. At a Board meeting on September 6, 1995, the Board discussed certain proposed amendments to the Code, including a proposed new definition of mezzanine which limited such areas to 1,200 square feet, with the result that mezzanine levels over 1,200 feet (such as the 1,400 square foot mezzanine at the Pittsfield Super Stop & Shop superstore) would be considered separate floors requiring two toilet rooms. McKinnon, as a Board member, argued against the mezzanine-related amendment.<sup>8/</sup> On March 6, 1996, McKinnon participated in a unanimous Board vote not to approve the proposed mezzanine-related amendment, together with a variety of other proposed amendments.

6. In 1997, Stop & Shop decided to incorporate a vacuum drainage system for the food storage cases in its new stores.<sup>9/</sup> While vacuum drainage systems were then allowed under the Code, Stop & Shop wanted to use a system with PVC (polyvinyl chloride) piping instead of the copper piping required by the Code, partly because the PVC was less expensive to purchase and install.

7. In early 1997, McKinnon assisted Stop & Shop in gaining the Board's approval of the temporary installation of a vacuum drainage system for food storage cases at its Braintree warehouse for testing and evaluation. In a letter to the Board, dated April 28, 1997, McKinnon wrote, "I have been asked by Stop & Shop Supermarkets to present to you a proposal to install a vacuum system in accordance with 248 CMR section 2.24 in an existing warehouse in Braintree, MA for testing and evaluation." Stop & Shop's proposal included the request to be allowed to use PVC piping (instead of copper piping).

8. At its May 7, 1997, meeting, the Board discussed Stop & Shop's proposal. McKinnon participated in the Board's discussion as a Board member and argued in favor of Stop & Shop's proposal. McKinnon, however, abstained from the Board's vote to allow the proposed vacuum drainage system installation with PVC piping. There was no opposition to Stop & Shop's proposal.

9. Subsequent to the Board's May 7, 1997 approval, Stop & Shop tested and evaluated vacuum drainage systems from two competing manufacturers: Envirovac and Jet-Vac.

10. In late 1997, Envirovac petitioned the Board for approval of the components of its vacuum drainage system for use in Massachusetts. Envirovac's petition included the request that the Board approve the use of PVC piping in the vacuum drainage system. At a December 3, 1997 Board meeting, McKinnon moved that the Board provisionally approve for a one year period the Envirovac vacuum drainage system components with a limited use of PVC piping.<sup>10/</sup> McKinnon, however, abstained from the Board's vote on his motion.

11. On January 30, 1998, town of Norwood Plumbing and Gas Inspector Jim Capaldo ("Capaldo") wrote a letter to a plumber working for Stop & Shop concerning a proposed vacuum drainage system installation using PVC piping at a Stop & Shop facility in Norwood. Capaldo's letter questioned whether the Norwood facility was a Board-approved test site for the vacuum drainage system and whether the Board had approved the components and installation of the system. Capaldo advised Stop & Shop's plumber that he should start proceedings to obtain a variance from the Board for the vacuum drainage system. A copy of Capaldo's letter was sent to the Board and its executive secretary, Louis J. Visco ("Visco").

12. At the Board's February 4, 1998 meeting, McKinnon read Capaldo's letter to the Board. Thereafter, McKinnon prepared a response letter to Capaldo at Visco's request. The McKinnon-drafted letter, dated February 5, 1998, approved by the Board and signed by Visco, responded point-by-point to the questions raised by Capaldo and advised, "Please understand this system has been approved and no variance is required nor shall one be issued."

13. As a Board member and as an advisor to the Board, McKinnon is, and was at all times here relevant, a state employee.<sup>11/</sup> Because he is uncompensated as a Board member and was uncompensated as a Board advisor, McKinnon is and was further a “special state employee.”<sup>12/</sup>

14. Section 4(c) of G.L. c. 268A, in relevant part, prohibits a state employee from acting as agent for anyone other than the commonwealth or a state agency in connection with a particular matter<sup>13/</sup> in which the commonwealth or state agency is a party or has a direct and substantial interest.<sup>14/</sup>

15. Stop & Shop’s early 1997 request for Board approval of its proposed installation of the vacuum drainage system with PVC piping for testing and evaluation was a particular matter in which the commonwealth was a party or had a direct and substantial interest, and was a subject of McKinnon’s official responsibility as a Board member.<sup>15/</sup>

16. McKinnon acted as Stop & Shop’s agent in connection with the vacuum drainage system particular matter by presenting Stop & Shop’s proposal to install the system in his April 28, 1997 letter to the Board.

17. Thus in April 1997, McKinnon acted as agent for someone other than the commonwealth or a state agency in connection with a particular matter which was within his official responsibility as a state official and in which the commonwealth was a party or had a direct and substantial interest. In so acting, McKinnon violated G.L. c. 268A, §4.<sup>16/</sup>

18. Except as the section otherwise permits, G.L. c. 268A, §6<sup>17/</sup> prohibits a state employee from participating as such in a particular matter in which to his knowledge, a business organization in which he is serving as an employee has a financial interest.<sup>18/</sup>

19. At the times here relevant, McKinnon was a Stop & Shop employee within the meaning of G.L. c. 268A, §6.<sup>19/</sup>

20. Each of the above-described plumbing issues that came before the Board in the years 1994 through 1998 were particular matters. Stop & Shop had a financial interest in each of these particular matters.

21. In August 1994 as a board advisor, and in September 1995, March 1996, May and December 1997 and February 1998 as a Board member, McKinnon participated<sup>20/</sup> in each of the above-described particular matters of interest to Stop & Shop by, as set forth above, at various Board meetings involving himself personally and substantially in Board discussions, in one case voting, in one case making a motion for Board action and in another case drafting a letter for the Board’s executive secretary concerning the matters. Each time he so participated as a Board advisor or as a Board member, McKinnon knew that, Stop & Shop, his private employer, had a financial interest in the particular matter at issue.

22. Therefore, by participating as a Board member as described above, McKinnon participated as a state employee in particular matters in which to his knowledge his private employer had a financial interest. Each time he did so, McKinnon violated G.L. c. 268A, §6.<sup>21/</sup>

23. McKinnon fully cooperated with the Commission’s investigation of this matter.

24. The Commission is aware of no evidence that McKinnon knew at the time of his above-described actions concerning Stop & Shop that his actions violated G.L. c. 268A.<sup>22/</sup>

In view of the foregoing violations of G.L. c. 268A by McKinnon, the Commission has determined that the public interest would be served by the disposition of this matter without further enforcement proceedings, on the basis of the following terms and conditions agreed to by McKinnon:

(1) that McKinnon pay to the Commission the sum of three thousand dollars (\$3,000.00) as a civil penalty for violating G.L. c. 268A, §4 and §6; and

(2) that McKinnon waive all rights to contest the findings of fact, conclusions of law and terms and conditions contained in this Agreement in this or any other related administrative or judicial proceeding to which the Commission is or may be a party.

**DATE: February 29, 2000**

<sup>1/</sup>McKinnon was appointed to the Board by the Secretary of Public Safety in September 1994. McKinnon previously served as a Board member from June 1989 to May 1992, and was an unpaid appointed advisor to the Board from May 1992 to September 1994.

<sup>2/</sup>Until his July 1, 1998 retirement, McKinnon's primary employment was as the plumbing and gas inspector for the town of Dedham.

<sup>3/</sup>Stop & Shop has three or four such inspectors working in various regions in New England. McKinnon is one of two Stop & Shop inspectors assigned to Massachusetts.

<sup>4/</sup>During the relevant period, McKinnon's work for Stop & Shop constituted nearly all of his privately compensated work. Stop & Shop's payments to McKinnon were reported for tax purposes on federal 1099-MISC forms as "non-employee compensation."

<sup>5/</sup>McKinnon did not do inspections for Stop & Shop at the Pittsfield store.

<sup>6/</sup>According to McKinnon, in making these arguments, he acted in his capacity as a Board advisor and not on behalf of Stop & Shop, and based his arguments on his understanding of the requirements of the Massachusetts Building Code ("Building Code"). Also according to McKinnon, he was not influenced in his arguments by the fact that the mezzanine issue came up in connection with Stop & Shop and he was not trying to help the company in making the arguments.

<sup>7/</sup>The Board's decision allowed Stop & Shop to avoid delay and several thousand dollars in added construction costs at the Pittsfield store. In addition, had the Board agreed with the Pittsfield inspector, the Pittsfield store might have become a precedent for requiring Stop & Shop to install two toilet rooms in the mezzanines of all its subsequently constructed superstores in Massachusetts. In McKinnon's view, requiring the two toilets on the mezzanine level would have put the Board in conflict with the Building Code and would not have been a valid precedent. It is unnecessary, however, for the purposes of this agreement to determine whether McKinnon is correct. Valid or not, a Board decision to require Stop & Shop to put two toilet rooms on the mezzanine level of the Pittsfield store would have cost Stop & Shop time and expense to either comply with or to seek to reverse or overturn.

<sup>8/</sup>Again according to McKinnon, he based his arguments solely on his understanding of the requirements of the Building Code.

<sup>9/</sup>The vacuum drainage system, in which the pipes are suspended from the ceiling, reduces the need for underground plumbing. The vacuum system thus gives Stop & Shop more flexibility in locating and relocating food storage cases and substantially reduces the cost of moving the cases.

<sup>10/</sup>McKinnon moved to approve the Envirovac components with PVC piping to be used to above the refrigerated cases being drained, at which point the piping would be required to transition from PVC to copper.

<sup>11/</sup>“State employee” means, in relevant part, “a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation on a full, regular, part-time, intermittent or consultant basis.” G.L. c. 268A, §1(g).

<sup>12/</sup>A “special state employee” is a state employee: “(1) who is performing services or holding an office, position, employment or membership for which no compensation is provided, or (2) who is not an elected official and (a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permit personal or private employment during normal working hours, provided that disclosure of such classification or permission filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or (b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as the equivalent to compensation for seven hours per day. A special state employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation.” G.L. c. 268A, §1(o).

<sup>13/</sup>“Particular matter” means any judicial or other proceeding, application, submission, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>14/</sup>A special state employee is subject to G.L. c. 268A, §4(c) “only in relation to a particular matter (a) in which has at anytime participated as a state employee, or (b) which is or within one year has been a subject of his official responsibility, or (c) which is pending the state agency in which he is serving. Clause (c) of the preceding sentence shall not apply in the case of a special state employee who serves no more than sixty days during any period of three hundred and sixty five consecutive days.”

<sup>15/</sup>McKinnon also participated in the particular matter as a Board member on May 7, 1997, as set forth above in paragraph number 8.

<sup>16/</sup>The Commission is not aware of any evidence that McKinnon received any compensation from Stop & Shop for acting as its agent before the Board or in relation to any of the above-described matters concerning Stop & Shop before the Board.

<sup>17/</sup>None of the §6 exemptions apply in this case.

<sup>18/</sup>“Financial interest” means any economic interest of a particular individual that is not shared with a substantial segment of the population of the municipality. See *Graham v. McGrail*, 370 Mass. 133, 345 N.E. 2d 888 (1976). This definition has embraced private interests, no matter how small, which are direct, immediate or reasonably foreseeable. See *EC-COI-84-98*. The interest can be affected in either a positive or negative way. See *EC-COI-84-96*.

<sup>19/</sup>At the times here relevant, McKinnon did not consider himself to be a Stop & Shop employee, but rather thought of himself as a consultant or independent contractor. For G.L. c. 268A purposes, however, the term “employee” includes consultants and independent contractors where, as in this case, a significant portion of the subject’s annual compensation from all of his private consulting or independent contracting generally is derived from, or a significant portion of the subject’s time is spent on, the consultant or independent contractor relationship in question. See, e.g., *In re Burgess*, 1992, SEC 570, 573.

<sup>20/</sup>“Participate” means to participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise. G.L. c. 268A, §1(j).

<sup>21/</sup>McKinnon demonstrated some awareness of and sensitivity to the conflict of interest law by abstaining from Board votes on matters of interest to Stop & Shop on May 7 and December 3, 1997. McKinnon's abstention from the Board's votes was, however, insufficient to avoid his violation of §6 where he participated in the Board's discussion and made the motion (in one case) leading to the Board's vote.

<sup>22</sup>Ignorance of the law is not a defense to a violation of the conflict of interest law. *In re Doyle*, 1980 SEC 11, 13; see also *Scola v. Scola*, 318 Mass. 1, 7 (1945).